IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 12 of 2005
with
SPECIAL CIVIL APPLICATION NO. 6903 OF 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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TALSHIBHAI NARSANGBHAI PATEL - Applicant(s)
Versus
DESAI AMBABEN JAGJIVANBHAI & 4 - Opponent(s)

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Appearance :
MS MEGHA JANI for Petitioner No(s).: 1.

MR MOHANBHAI DESAI for Respondent No(s).: 1, 2, 3, 4,5.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 24/08/2005

ORAL JUDGMENT

1.Instant common judgement shall govern the disposal of these two petitions arising out of one and the same

proceedings, that is Regular Civil Suit No. 239 of 1990 on the file of learned Civil Judge (JD), Kheralu.

2. Since common question of law and facts are involved in these two petitions, with the consent of the learned advocates appearing for the parties, both the petitions are heard together and decided by this common judgement.

3. Civil Revision Application No. 12 of 2005 is directed against the order dated 1.10.2004 passed below application exh.26 in Civil Misc. Application No. 2 of 2003 by the learned Extra Assistant Judge, Mahesana, by which the application filed by the respondents seeking condonation of delay in filing the application seeking to set aside the abatement of Regular Civil Appeal No. 58 of 1997 came to be allowed by imposing cost of Rs.3000/- on the respondents.

4. Special Civil Application No. 6903 of 2004 is directed against the order dated 20.4.2001 passed below application exh.108 in Regular Civil Suit No. 239 of 1990 by the learned Civil Judge (JD), Kheralu and also the judgement and order dated 19.4.2002 passed in Civil Misc. Application No. 111 of 2001 by the learned 2nd Joint District Judge, Mahesana, by which the application filed by the opponents/respondents for amendment in the title of the Plaint to add the words “Legal heirs of the deceased, his son Desai Arvindkumar Jagjivanbhai-Adult, Occupation:- Agriculture and advocate residing at Utsav Bungalows, Mahesana” has been rejected and also appeal against the said order has been dismissed.

5. On 26.12.1990, Desai Jagjivanbhai Savjibhai has filed Regular Civil Suit No. 239 of 1990 against Patel

Talshibhai Narsangbhai inter alia praying for (i) a declaration to the effect that all trees standing on clay Pala on the suit land are of his ownership and (ii) for permanent injunction restraining the defendant from cutting or damaging the aforesaid trees. The said suit came to be dismissed by the learned Civil Judge (JD), Kheralu vide judgement and decree dated 12.2.1997.

6. On 3.5.1997, Jagjivanbhai Savjibhai – original plaintiff has filed Regular Civil Appeal No. 58 of 1997 in the District Court, Mahesana, through his power of attorney holder Arvind Jagjivanbhai Desai – original plaintiff , who is his son and a practicing advocate. Original plaintiff, Jagjivanbhai died on 31.3.1998, that is, after filing of the appeal by his power of attorney holder Arvind Jagjivanbhai Savjibhai.

7. The learned appellate Judge who heard the Regular Civil Appeal No. 58 of 1997 has partly allowed the same and thereby suit has been remanded to the trial Court for deciding afresh after framing the issues as stated in the judgement.

8. Thereafter, Arvindkumar Jagjivanbhai, power of attorney holder of deceased Jagjivanbhai Desai filed an application exh.108 in Regular Civil Suit No. 239 of 1990 on 25.1.2001 for amendment in the title of the plaint by inserting the words “legal heirs of the deceased, his son Desai Arvindkumar Jagjivanbhai – Adult, Occupation:- Agriculture and advocate residing at Utsav Bungalows, Mahesana”. The learned Civil Judge (JD), Kheralu who heard the application exh.108 in Regular Civil Suit No. 239 of 1990 rejected the same and decided the suit as abated vide order dated

20.4.2001.

9. Aggrieved thereby, Arvindkumar Jagjivanbhai filed Misc. Civil Appeal No. 111 of 2001 on 19.4.2002 challenging the order passed below application exh.108 by the learned Civil Judge (JD), Kheralu. The learned 2nd Joint District Judge, Mahesana who heard the appeal, dismissed the same vide order dated 19.4.2002 by holding that there is total delay, laches and acquiescence on part of the appellant.

10. Aggrieved thereby, Arvindkumar Jagjivanbhai Desai filed Civil Revision Application No.1219 of 2002 before this Court, challenging the order dated 19.4.2002 passed in Civil Misc. Appeal No. 111 of 2001 by the learned 2nd Joint District Judge, Mahesana. Civil Revision Application No. 1219 of 2002 filed before this Court has been permitted to be converted into Special Civil Application vide order dated 16.6.2004 and it is numbered as Special Civil Application No. 6903 of 2004.

11. The widow and children of deceased Jagivanbhai Savjibhai Desai filed Civil Misc. Application No. 2 of 2003 on 4.1.2003 in the Court of learned District Judge, Mahesana praying that (i) the abatement of Regular Civil Appeal No. 58 of 1997 and the judgement dated 16.12.2002 passed in the Appeal be set aside, (ii) delay in filing the application from 31.8.1998 to 4.1.2003 be condoned and (iii) the name of the applicants be shown in place of appellant – Jagjivanbhai and Appeal No. 58 of 1997 be decided on merits after restoring it.

12. The learned Extra Assistant Judge, Mahesana allowed the Civil Misc. Application No. 2 of 2003 vide order

dated 1.10.2004 and thereby delay caused in filing the application has been condoned on payment of cost of Rs.3000/- by the respondent.

13.The heirs and legal representatives of the deceased Jagjivanbhai filed Civil Misc. Application No. 150 of 2004 in November/December 2004 for setting aside abatement of Appeal and for showing names of the applicants in place of Jagjivanbhai and for deciding Appeal No. 58 of 1997 on merits.

14.Talshibhai Narsangbhai Patel – original defendant filed Civil Revision Application No.12 of 2005 on 22.1.2003 before this Court challenging the order dated 1.10.2004 passed by the learned Extra Assistant Judge, Mahesana in Civil Misc. Application No. 2 of 2003.

15.This Court has considered the submissions advanced by Ms. Megha jani, learned advocate of the petitioner in Civil Revision Application No. 12 of 2005 and respondent in Special Civil Application No. 6903 of 2004 as well as Mr. Mohanbhai Desai, learned advocate of the petitioner in Special Civil Application No. 6903 of 2004 and respondents in Civil Revision Application No. 12 of 2005 and also perused the orders which are impugned under these two petitions as well as various orders passed by the learned Civil Judge (JD), Kheralu and the learned Appellate Judge of the Mahesana District Court.

16.There is no dispute with regard to the factual matrix that the on 26.12.1990, Desai Jagjivanbhai Savjibhai has filed Regular Civil Suit No. 239 of 1990 against Patel Talshibhai Narsangbhai inter alia praying for (i) a declaration to the effect that all trees standing on

clay Pala on the suit land are of his ownership and (ii) for permanent injunction restraining the defendant from cutting or damaging the aforesaid trees. The said suit came to be dismissed by the learned Civil Judge (JD), Kheralu vide judgement and decree dated 12.2.1997. At the time of dismissal of the Suit, Desai Jagjivanbhai Savjibhai was very much alive. Notwithstanding the aforesaid facts, appeal being Regular Civil Appeal No. 58 of 1997 was filed in the District Court, Mahesana on 3.5.1997 against the dismissal of the suit, by Jagjivanbhai Savjibhai-original plaintiff through his power of attorney holder – Arvind Jagjivanbhai Desai, who is the son and a practicing advocate. Original plaintiff Jagjivanbhai died on 31.3.1998, that is after filing of the appeal by his power of attorney holder Arvind Jagjivanbhai Savjibhai. After the demise of Jagjivanbhai Savjibhai, Regular Civil Appeal No. 58 of 1997 was heard and came to be partly allowed vide order dated 16.12.2000, remanding the matter to the trial Court for deciding afresh by suggesting the issues mentioned in the judgement. Therefore, it is obvious that the appeal came to be allowed on 16.12.2000 after the demise of original plaintiff who has filed appeal through his power of attorney holder - Arvind Jagjivanbhai Desai, who is the son and a practicing advocate of District Court, Mahesana. Therefore the judgement and decree in the said appeal was passed in favour of the dead person. It is required to be noted that the power of attorney holder-Arvind Jagjivanbhai Desai – original plaintiff, who is the son of Jagjivandas and a practicing Advocate did not bring to the notice of the learned concerned appellate Judge the fact about the

demise of Jagjivandas Savjibhai. Inspite of knowing that his father, sole plaintiff has filed on 31.3.1998, Arvind Jagjivanbhai Desai did not take any step to bring the heirs and legal representatives on record during the pendency of the appeal nor even when it was partly allowed on 16.12.2000.

17.On reading application exh.108, it is not an application for bringing heirs and legal representatives of deceased Jajivandas on record. There was no prayer for condonation of delay in the said application. The application was intentionally marked as application for amendment. According to this Court, such application is clearly misconceived and is rightly rejected by the trial Court vide order dated 20.4.2001. When the said application is filed and it was brought to the notice of the trial Court that sole plaintiff has died and thereafter application for bringing heirs and legal representatives on record, was not filed, the only option before the trial Court was to declare that the suit is abated and the trial Court has rightly did it.

18.So far as the Civil Misc. Appeal No. 111 of 2001 is concerned, which is filed against the order dated 20.4.2001, while passing the order, the learned Joint District Judge has noted that Arvind Jagjivanbhai Desai also is a practicing advocate had knowledge of the steps that were required to be taken and that there was delay, laches and acquiescence on the part of the applicant and thereafter rejected the said Appeal. According to this Court, no infirmity or illegality, much less the jurisdictional error, has been committed by the learned Civil Judge (JD), Kheralu in passing the order below application exh.108 as well as by the

learned 2nd Joint District Judge, Mahesana in passing the order in Civil Misc. Appeal No. 111 of 2001, requiring interference of this Court in exercise of powers conferred under Article 227 of the Constitution of India.

19.In aforesaid view of the matter, the Special Civil Application No. 6903 of 2004 lacks merit and deserves to be rejected with no order as to costs.

20.Now this takes me to examine the challenge made in the Civil Revision Application No. 12 of 2005 by the original defendant of Regular Civil Suit No. 239 of 1990. It may be noted that in Civil Misc. Appeal No. 111 of 2001, the learned 2nd Joint District Judge, Mahesana in paragraph 10 has observed as under:

"The present appellant is an advocate who is practicing advocate. So he has knowledge about what steps required to be taken when the plaintiff expired. The appellant must be knowledge about Order-22, Rule-3 of the C.P.C. The appellant had never cared to bring the legal heirs to brought on the record in R.C.A. No. 58/1997. Without bring the legal heirs on the record in R.C.A. No. 58/97 is heard and appeal is allowed and matter was remanded. So I am of the view that there is a total delay, laches and acquiescence on the part of the appellant. The appellant had not given delay condone application for bringing the legal heirs on record. So that I am of the view that in R.C.S. No. 239/90 the learned Trial Judge has rightly and correctly abated the suit and rejected the application Exh.108."

According to this Court the aforesaid order operates as resjudicata. After the aforesaid order, the learned Extra Assistant Judge ought not to have condoned the delay vide order dated 1.10.2004 passed in Civil Misc. Application No. 2 of 2003 as the reasons advanced for condonation of delay are the same.

21.The learned trial has failed to appreciate that

Regular Civil Appeal No. 58 of 1997 was allowed by his predecessor. The said appeal had not abated. In the circumstances, any application for setting aside the abatement or for restoration of the said appeal is not maintainable. Apart from this, after allowing the appeal, the learned appellate Judge had become functus officio. The order dated 1.10.2004 passed in Civil Misc. Application No. 2 of 2003 is ex facie, without jurisdiction and suffers from patent error of law.

22.The conduct of the power of attorney holder of the original plaintiff is unfair and mala fide. The power of attorney holder who is a practicing advocate very will knew that he was required to bring heirs of his deceased father on record. He chose to remain silent for almost three years. Even when the suit was reopened after remand, he did not give an application for condonation of delay and for bringing heirs of the deceased on record. What is given is an application for amendment of title of the Plaint. The application for setting aside the so called abatement of appeal is given in January 2003. The application exh.108 for amendment of the title of the plaint was rejected on 20.4.2001. The learned trial Judge by a reasoned order dated 12.2.1997 dismissed the suit. The plaintiff had an opportunity to establish his case which was only with respect to the trees standing on Pala. However, the learned 2rd Joint District Judge, Mahesana in Regular Civil Appeal No.58 of 1997 framed the following issues:

(i) Whether the plaintiff proves that the dispute clay Pala and trees situated between the lands of the parties belong to his ownership?

(ii) Whether the plaintiff proves that there was a cart way for the use of the plaintiff situated to Southern hedge of plaintiff's land?

(iii) Whether the plaintiff proves that the defendant has illegally made encroachment towards the land of the plaintiff?

(iv) Whether the plaintiff proves that the defendant has made encroachment of of Government land on East, West and Southern side of his land?

(v) Whether the plaintiff proves that the defendant has sold out trees belonging to the Government?

(vi) Whether the defendant proves that the trees situated on the middle of clay pala are of joint ownership of the parties?

23.According to this Court, the said issues travel beyond the scope of the suit. The order was clearly without jurisdiction, bad and illegal. However, since the appellant had died during the pendency of the appeal, it was an order in favour of a dead person. The defendant, in the circumstances, did not file an appeal and rightly so because had he done that, he would have to bring legal of the deceased on record. Till today, heirs are not brought on record. The defendant in the circumstances has not challenged the order passed in Regular Civil Appeal No.58 of 1997. Therefore, according to this Court, there is no infirmity in the judgement passed by the trial Court. If Arvindkumar Jagjivanbhai is allowed to succeed inspite delaying tactics and mala fide intentions as are obvious from record, the defendant will be deprived of his right to file an appeal challenging the decision in Regular Civil Appeal No. 58 of 1997. Not only this, he will have to face a trial which goes much beyond the scope

of the original suit. The original suit was only with respect to the trees. No trees are existing on the land.

24. In aforesaid view of the matter, according to this Court, the order dated 1.10.2004 recorded below application exh.26 in Civil Misc. Application No. 2 of 2003 by the learned Extra Assistant Judge, Mahesana granting the application filed by the respondent seeking condonation of delay deserve to be quashed and set aside as the learned Extra Assistant Judge has committed not only illegality and infirmity but jurisdictional error as well, as even today there is no application for bringing heirs and legal representatives of deceased Jagjivanbhai is on record. What is given is the application for amendment of the title of the Plaint.

25. For the foregoing reasons, the Civil Revision Application No. 12 of 2005 succeeds and accordingly it is allowed with no order as to costs. Resultantly, the order dated 1.10.2004 recorded below application exh.26 in Civil Misc. Application No. 2 of 2003 by the learned Extra Assistant Judge, Mahesana is hereby quashed and set aside and Civil Misc. Application No. 2 of 2003 is rejected. Rule is made absolute to the aforesaid extent.

26. The Special Civil Application No. 6903 of 2004 is rejected with no order as to costs and, resultantly, the order dated 20.4.2001 recorded below application exh.108 in Regular Civil Suit No. 239 of 1990 by the learned Civil Judge (JD), Kheralu and the the order dated 19.04.2002 passed in Civil Misc. Application No.

111 of 2001 by the learned 2nd Joint District Judge, Mahesana, are hereby confirmed and maintained. Rule is discharged.

27. Net result of the aforesaid discussion is that Regular Civil Appeal No. 58 of 1997 filed by Jagjivanbhai Savjibhai – original plaintiff through his power of attorney holder – Arvind Jagjivan Savjibhai is abated and therefore the judgement and decree dated 12.2.1997 passed in Regular Civil Suit No. 239 of 1990 dismissing the suit filed by Jagjivanbhai Savjibhai against Talshibhai Narsangbhai is confirmed.

(A.M.Kapadia,J)

Jayanti*